



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

August 18, 2011

Major General William T. Grisoli
U.S. Army Corps of Engineers
441 G Street, N. W.
Washington, D.C. 20314-1000

Dear Major General Grisoli:

I am writing to strongly encourage the U.S. Army Corps of Engineers (USACE) to embrace a number of adjustments in its proposed levee maintenance guidelines in order to reflect our shared Federal obligations for public safety and environmental stewardship. At the outset, allow me to express my thanks to you for meeting on July 20, 2011 with our regional team (Washington State Governor's Office, Puget Sound Partnership, King Co. and my staff) that traveled to Washington D.C. to discuss the Seattle District Corps Levee Vegetation Framework Project and the developing draft System-Wide Improvement Framework policy. That meeting was an important step in building a better understanding between you, the parties working these issues in the Pacific Northwest, and the U.S. Army Corps of Engineers (USACE) Headquarters staff with program responsibility.

I raise several recommendations in this letter – all related to the USACE implementation of Public Law 84-99 (P.L. 84-99) with a particular emphasis on this program's role in affecting our stewardship responsibilities both in the Pacific Northwest and California. As further explained below, we recommend several parallel approaches: 1) endorsement by the USACE of the Seattle District Corps Levee Vegetation Framework Project; 2) adjustments in the System-Wide Improvement Framework (SWIF) to achieve a proper balance of our public safety and environmental stewardship obligations; 3) adjustments in the variance processes recommended by the Policy Guidance Letter (PGL) that will better reflect local conditions; and 4) addressing directly the ESA liabilities which the current approach generates both for the USACE and for local sponsors. In forwarding these recommendations to you, we note as well with emphasis the close interrelationship of these stewardship obligations with our shared Federal trust responsibilities to the Treaty Tribes of the Pacific Northwest. This letter is intended to reinforce key components of the August 5, 2010 letter from Robyn Thorson, U.S. Fish and Wildlife Service Regional Director – Pacific Region, Brigadier General John McMahon, your NW Division Commander, and myself.

Background

NMFS has been substantively engaged with the Seattle District on P.L. 84-99 implementation for the last 11 years. Part of that effort has included considerable interactions on levee vegetation maintenance by local sponsors as directed by the Seattle District, for their continued participation in the P.L. 84-99 program. As you know, sponsors must manage their levee vegetation for



public safety according to Engineer Regulation 500-1-1 and Engineer Pamphlet 500-1-1 (ER/EP 500-1-1) or under a USACE approved variance. The Seattle District variance has been in place for about 12 years in Washington State, and throughout this time frame NMFS has been crystal clear with the USACE that woody vegetation maintenance in accordance with the Seattle District variance (and certainly ER/EP 500-1-1) seriously alters critical habitat of ESA listed salmon. NMFS has requested the Seattle District consult with NMFS under ESA Section 7(a)(2) of the ESA regarding the effect of the USACE requirement of local sponsors to maintain levee vegetation in this manner. Local sponsors in the Pacific NW (notably King Co. in Washington State) are significantly concerned about their ESA liability when they cut woody vegetation in salmon critical habitat, fearing either a NMFS enforcement action or third party lawsuit for unlawful “take” under section 9 of the ESA. Some of these sponsors believe much of the woody vegetation they have been required to cut in fact protects levee integrity while providing habitat functions important to listed salmon. Sponsors feel “caught between a rock and a hard place” since they want to comply with the ESA and they want to stay eligible for the P.L. 84-99 program.

Native American Treaty Tribes in Washington State are also concerned with the woody vegetation maintenance standards of P.L. 84-99, believing the levee vegetation standards have decreased salmon productivity of many Northwest rivers. They further believe this decreased productivity directly affects their treaty reserved right to harvest salmon.

Importantly, all the entities mentioned above (NMFS, levee sponsors, and the Treaty Tribes) believe levee safety is of high value, and want to preserve levee integrity. But all also believe levee safety can be accomplished with a levee vegetation maintenance approach that also provides for functioning riparian habitats on levees.

Seattle District Corps Levee Vegetation Framework Project

Seattle District Col. Anthony Wright started this project in October 2010, in response to the draft PGL. NMFS has been working with the Seattle District on this project since its inception. The goals of the project include ensuring public safety and meeting natural resource management objectives for ESA listed salmon and protected by Native American Treaty rights while allowing levee sponsors to maintain eligibility in the P.L. 84-99 program. The project seeks to meet the ecological needs of riparian habitats for ESA listed salmon, including riparian vegetation density and structure to provide shade, soil stability, submerged and over-hanging large wood, bank cover, insect drop and litter fall. The product of this project will create a model variance for the Green and Cedar Rivers, and a template for levee owners based on the Green/Cedar model for use in developing a transition plan and/or applying for a variance in the other river systems. NMFS is fully supportive of the objectives of this program and believes that collaborative efforts like this that have the highest likelihood of meeting the needs of levee integrity, public safety and ecological needs of listed salmon.

System-Wide Improvement Framework

NMFS HQ is currently coordinating with USACE HQ and commenting on the draft SWIF policy. However there are three fundamental concerns with the developing policy I want to emphasize here. First is the time needed by local sponsors to implement a SWIF program in the

Pacific NW. Most levee systems in this region were built too close to the river edge. In fact, many of these levees actually form the banks of our rivers, and have over-steepened levee faces. Financial resources necessary to support the community commitment to perform system wide improvements such as levee set-backs are very high. It will take time to generate the resources and acquire property needed to do the levee set-backs. We therefore urge the USACE to be flexible in allowing local sponsors adequate time to get this work accomplished. Realistically, this may take 5 to 10 years. I understand that in smaller communities in Eastern Washington, even longer time frames may be necessary.

Secondly, the current draft SWIF policy identifies the USACE Director of Contingency Operations and Homeland Security (DCO/HS) as the approval authority for P.L. 84-99 extension of eligibility and acceptance of a SWIF. I firmly believe the regional conditions here in the Pacific NW render that a flawed and unnecessary construct. NW flooding events, while serious at times, are typically of much shorter duration than in other parts of the country. This has bearing on the issues of levee saturation and seepage. Also, wind patterns are geographically variable in force and intensity, so the prospect of windthrow effects to woody vegetation on levees throughout the region is not amenable to a one-size fits all solution. These issues and others make it much more practical and physically accurate to utilize regional decision-making for the approval authority for P.L. 84-99 extension of eligibility and acceptance of a SWIF.

Finally, the target for levee vegetation maintenance at the conclusion of a SWIF process remains the national standard of ER/EP 500-1-1. If through SWIF, levee setbacks were to occur to such an extent that riparian trees can be grown inside the levee prism for much of the levee system, the national standard might be satisfactory. But that will not be feasible in most circumstances in the built environment of the Pacific NW. More flexibility in the standard is needed. This rigid one size fits all standard, while conservative for public safety reasons, will not be acceptable to most communities in the Pacific NW because of the conflict with the habitat needs of ESA listed salmon and Native American Indian Treaty rights. It seems more reasonable to have a scientifically based woody vegetation maintenance target such as that under development in the Seattle District Levee Vegetation Framework Project or something similarly tuned to the local landscape and watershed conditions.

Policy Guidance Letter

NMFS formally commented on the February 9, 2010 PGL on April 22, 2010, and again in the three agencies executive letter mentioned above and dated August 5, 2010. One theme worth repeating here is similar to the concern above on the draft SWIF policy. The PGL process steps are overly cumbersome and final decision-making will occur at HQ USACE Levee Safety Officer (LSO). The LSO has no responsibility in the region operating levee systems in conjunction with local authorities. As such, this process will miss a huge opportunity to leverage the very successful regional decision-making model operating in the Pacific NW for years. Thus, a process that is approved at the regional level will be most capable of accounting for and reflecting the physical and environmental factors involved while accommodating the collaborative regional approaches to achieve the public safety and environmental objectives of the program.

Endangered Species Act Considerations

The proposed vegetation standards for the P.L. 84-99 program, the SWIF and the other PGL policies will if implemented have a direct and substantial adverse effect on critical habitat functions for ESA listed salmon habitat and is highly likely as applied to result in unauthorized “take” of listed species or adverse modification of their designated critical habitats. While we genuinely appreciate the collaborative approach to these issues employed by NW Division and the Seattle District, formal ESA reviews and authorizations remain notably absent. As identified in “background” above, this puts local sponsors in a very difficult position, one that can be remedied in part by the federal agencies engaging in Section 7(a)(2) consultation on the levee vegetation maintenance standards. The current program in the Pacific NW meets the “may affect” standard for programs that are funded, authorized or carried out by a federal agency, and as such is subject to section 7(a)(2) consultation. I would be pleased to meet with you or your regional command to identify the most appropriate and efficient mechanism to conduct ESA consultations on this important program, whether it be the national standard ER/EP 500-1-1, Seattle District Variance, or the upcoming result of the Seattle District Corps Levee Vegetation Framework Project.

Native American Treaty Trust Obligations

As I mentioned above, NW Indian tribes have been concerned about the effect of the levee vegetation maintenance program to salmon productivity for many years. Recently, the western Washington Treaty Indian tribes produced a report called “Treaty Rights at Risk, ongoing habitat loss, the decline of the salmon resource, and recommendations for change.” In this report, they charge the federal government has not lived up to its obligations towards the tribal treaty right to harvest fish and shellfish. They assert this is caused by a lack of coordinated federal leadership, a failure to exercise authorities and the disparate application of salmon conservation measures. The issues and circumstances around levee vegetation maintenance are among the important areas where we can work together to create a more responsive federal approach to address their concerns around salmon habitat that bear on levee maintenance program of P.L. 84-99. I urge you to work with us to modify the P.L 84-99 program elements (SWIF, PGL, etc.) to better adhere to our shared Federal treaty trust obligations.

In conclusion, I hope you share my concerns regarding implementation of the very important P.L. 84-99 program, the developing policies (SWIF, PGL) and potential tool (Seattle District Corps Levee Vegetation Framework) in the Pacific NW. It is essential to create a framework that can meet both public safety/levee integrity objectives and environmental objectives of the ESA in a manner consistent with upholding the treaty/trust obligations of the federal government to Native American Indian tribes. I look forward to our continued mutual engagement on these topics and thank you for your help and support.

Sincerely,

A handwritten signature in blue ink, reading "William W. Stelle, Jr." in a cursive style.

William W. Stelle, Jr.
Regional Administrator